NO. 87-1143

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1987

TOM HOLLIS, JR.

Petitioner

versus

CAMPBELL COUNTY (KENTUCKY) DISTRICT COURT

Respondent

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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EDITOR'S NOTE

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

IS THERE A BASIS FOR THIS COURT TO REVIEW WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT MISINTERPRETED KENTUCKY LAW ON THE STANDARD OF PROOF FOR SCIENTER IN AN OBSCENITY CASE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The Per Curium Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the Order of the District Court denying the Petition for Writ of Habeas Corpus dated September 1, 1987, was correctly set forth in petitioner's appendix.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner contends that the Fifth Amendment to the United States Constitution is involved.

COUNTERSTATEMENT OF THE CASE

After a jury trial in the Campbell County Kentucky District Court, petitioner Tom Hollis, Jr. was found guilty of criminal facilitation and sentenced to 90 days in the county jail plus a $250 fine.

On July 12, 1980, officers viewed films at the Cinema X Theatre in Newport, Kentucky. There were no titles on the films although they were referred to as "detective movie" and "antique shop movie." Petitioner Tom Hollis was charged with criminal facilitation and other individuals were charged with distribution of obscene matter and criminal facilitation. A sign in the theatre advised that the movies are sexually oriented, sexually explicit and if they offend you, please stay out. The sign further stated that the individual must be 18.

During the trial it was shown that various payroll withholding forms and other documents were signed by petitioner for the company or companies exhibiting the films. Petitioner was the only person to have a signature card for Brown Bear, Inc. and Happy Day, Inc. with the Boone State Bank in Florence, Kentucky. He made deposits for the two corporations.[1]

Petitioner appealed from the judgment of the Campbell District Court to the Campbell Circuit Court. On March 9, 1983, the Campbell Circuit Court issued its Findings of Fact, Conclusions of Law and Judgment and affirmed the judgment of the trial court. Petitioner moved for discretionary review with the appellate courts of Kentucky and petitioned for certiorari to the United States Supreme Court. Both the motion

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[1]Petitioner did not testify in his own behalf; however, with his responsibilities, it is highly unlikely that petitioner had never been in the theatre.

for discretionary review and petition for certiorari were denied.

Petitioner then filed a petition for writ of habeas corpus with the United States District Court, Eastern District of Kentucky at Covington. In a thorough and well-reasoned report the Magistrate recommended the petition be denied. The District Judge adopted the Magistrate's recommendation. In concluding that the petition should be denied, the Magistrate noted that a conviction for facilitation in distribution of obscene material may be based upon circumstantial evidence. The Magistrate noted the various items of evidence which supported the judgment. Petitioner's next move was to appeal to the United States Court of Appeals for the Sixth Circuit. In affirming the District Court's judgment, the court held that a rational trier of fact could properly have found that Mr. Hollis knew what kind of business Cinema X was engaged in and knew the character and nature of

the films he was procuring for Cinema X. Petitioner has now petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THERE IS NO REASON FOR THIS COURT TO REVIEW WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT MISINTERPRETED KENTUCKY LAW ON THE STANDARD OF PROOF FOR SCIENTER.

The Court of Appeals for the Sixth Circuit has not rendered a decision which is in conflict with the decision of another federal court of appeals on the issue in this matter. Likewise, the Court of Appeals did not decide a federal question in conflict with the Kentucky Supreme Court nor has it departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. (Rule 17.1[a] of the U. S. Supreme

Court Rules.) Furthermore, the Sixth Circuit Court of Appeals did not decide an important question of federal law which had not been, but should be, settled by this Court, nor has it decided a federal question in a way in conflict with applicable decisions of this Court. (Rule 17.1[c] of the U. S. Supreme Court Rules.)

Petitioner maintained that the Court of Appeals (now Supreme Court) of Kentucky required in Keene v. Commonwealth, Ky. 516 S.W.2d 852, 855 (1974) a standard for scienter which exceeds the requirements denoted by this Court in Hamling v. United States, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974). Petitioner has suggested that the Sixth Circuit Court of Appeals and by implication the appellate courts in Kentucky have misapplied the holding of Keene v. Commonwealth, supra., to the facts of this case.

It is elementary that this Court will not review routine decisions of state and federal

appellate courts.[2] Keene v. Commonwealth, supra., was decided by interpreting a statute in existence prior to the statute in effect at the time of petitioner's conviction.[3]

Keene v. Commonwealth, supra., was decided on an error in an instruction to the jury. The court in that case stated that the jury was to be instructed that the defendant had knowledge of the obscenity of the film. Petitioner suggests that the standard in Keene, supra., was more stringent than Hamling v. U.S., supra., which noted that it is constitutionally sufficient that the prosecution show that a defendant

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[2]This Court had previously denied a writ of certiorari for review of the Kentucky appellate decision in this matter. The petitioner now approaches this court on review from his denial of a petition for a writ of habeas corpus.

[3]Kentucky Revised Statutes (KRS) 436.101 was repealed at the time KRS 531.010, et seq. was enacted. KRS 531.010, et seq. was enacted in response to this Court's ruling in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2d 419 (1973). The commentary to KRS 531.010, et seq. indicates that the substantive provisions contained in the new statute are the same as those contained in the former.

had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. It is ludicrous to suggest that this Court review the question of whether an obscure passage in a Kentucky decision involving jury instructions set a more stringent standard for scienter than required by this Court in Hamling, supra. This Court should not be involved with such trivia.

II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

Petitioner has claimed that the evidence was not sufficient to support the conviction. There is no need under the scienter requirement to show that petitioner actually viewed the films in their entirety but merely that petitioner knew the general nature and character of the films. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), Mishkin v. New

York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1965), United States v. American Theatre Corporation, 526 F.2d 48 (8th Cir. 1975), United States v. Friedman, 528 F.2d 784 (10th Cir. 1976). There was sufficient evidence for the jury to conclude that petitioner was aware of the general nature and character of the films.

Pursuant to a contract entered into by petitioner and Brown Bear, Inc., which operated the Cinema X Theatre, petitioner was to supervise and disburse funds earned from the operation of the various enterprises operated by the corporation, pay bills, taxes or other assessments concerning the business operation, hire or discharge any employee subject only to the requirement that the local manager of the enterprise must consent to the action taken, and hire, engage or contract with any accounting firms, business consultants or individuals in order to insure the successful operation and management of the business enterprises. In carrying out these functions, petitioner wrote checks for the

normal business expenses such as utilities, etc., but also wrote checks to Entertainment World, Inc., for what was apparently the rental of films such as "Hot Lunch" (check No. 1560), "Hot Honey" (check No. 1558), "Bad Penny-Double Your Pleasure" (check Nos. 1575 and 1585), and "Soft Places" and "Other Side Julie" (check No. 1559).

In addition to the above, it should be noted that Brown Bear, Inc., d/b/a Cinema X, was convicted of distribution of obscene matter in the Campbell Circuit Court on May 22, 1978. In the reported case of United States v. Marks, 585 F.2d 164 (6th Cir. 1978),[4] the prior owners of Cinema X were convicted of transporting an obscene film, "Deep Throat," to the Cinema X in violation of federal statutes. (That conviction was overturned on an unrelated Bruton issue.)

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[4]It should be noted that petitioner wrote a check to Stanley Marks in the amount of $1700 on or about July 25, 1980 (check No. 776).

The name of the theatre, "Cinema X," suggests that X-rated and therefore obscene films were being shown. As noted by the court in United States v. Sandy, 605 F.2d 210 (6th Cir. 1979):

> "The finder of fact, whether trial judge or jury, is not obliged to lay aside his general knowledge of life in evaluating the evidence. . . ."

While it might be suggested that some X-rated films may not be obscene, it asks too much of credibility to expect that under the circumstances petitioner would not have known the general nature and character of the films even though there may not have been any proof that he actually viewed the films. U.S. v. Sandy, id.[5]

In discussing scienter in the mailing of obscene materials the Supreme Court stated in Hamling v. United States, 418 U.S. 87, 124, 41 L.Ed.2d 590, 625, 94 S.Ct. 2887 (1974):

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[5]Furthermore, the sign in the theatre restricting admittance to patrons over 18 indicates that sexually explicit material was being shown.

> ". . . Based on the evidence before it, the jury was entitled to conclude that the individual petitioners, as corporate officials directly concerned with the activities of their organizations, were aware of the mail solicitation scheme, and of the contents of the brochure. . . . "

In the case sub judice when all the facts are tallied, it is obvious that there is substantial evidence to support the trial court, the Kentucky appellate court, the U. S. District Court and the Sixth Circuit's finding that petitioner possessed the necessary degree of scienter. Error was not committed. Loveday v. Davis, 697 F.2d 135 (6th Cir. 1983).

CONCLUSION

This Court should not review a question of whether an obscure passage in a 1974 Kentucky decision involving jury instructions set a more stringent standard for scienter than the standards outlined by this Court. There is not a sufficient public or legal issue involved for

this Court to review the decision of the Court of Appeals for the Sixth Circuit. The decision of that court was factually and legally correct.

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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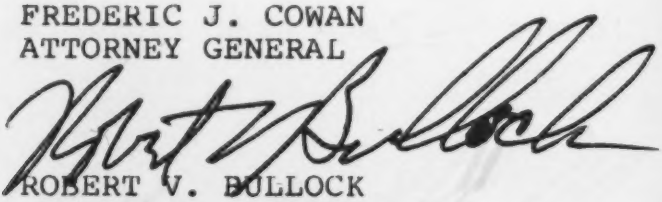

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT have been mailed, Unites States Postage prepaid, to Hon. C. Thomas Hectus, 635 West Main Street, Fourth Floor, Louisville, Kentucky 40202, this the 5th day of February, 1988.

Robert V. Bullock
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